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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO.

J. P. STEVENS & CO., INC.,

Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD

and

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO

and

MILDRED G. BAILEY, ET AL, EMPLOYEES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner prays the Court for a Writ of Certiorari directed to the United States Court of Appeals for the Fifth Circuit, to the end that this Court may review a decision which that Court has rendered in

a case involving the parties above-named. And the Petitioner respectfully shows to this Court:

THE OPINIONS AND JUDGMENT IN THE COURT BELOW AND THE DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

The Opinion of the United States Court of Appeals for the Fifth Circuit, and the Special Concurring Opinion in that Court, have not yet been printed in the official reports, but may be found in the following unofficial reports:—76 LRRM 2817 (1971) and 65 Labor Cases ¶11,608 (1971). The Opinions, along with the Judgment of the Court, are set forth in the Appendix to this Petition.

The case came to the Court of Appeals upon Petitions for Review of a Decision and Order of the National Labor Relations Board. The Decision and Order of the Board, 179 NLRB No. 47 (1969), is likewise printed in the Appendix to this Petition.

JURISDICTION OF THIS COURT

The Judgment of the Court of Appeals is dated April 13, 1971, and was entered on that date.

Jurisdiction to review, by Writ of Certiorari, the Judgment of the Court of Appeals is conferred on this Court by the provisions of 28 USC §1254(1).

QUESTION PRESENTED

In a situation where an overwhelming majority of employees have, in an election conducted by the

Labor Board, voted against Union representation—and where a determinative number of such employees have established by sworn testimony, under examination and cross-examination in a Labor Board hearing, that they signed Union cards upon representations that the cards could not have any compulsory effect of any sort except to "bring on an election" and that only by winning such election would the Union be able to require recognition as the employees' representative—and where these employees have intervened as litigants and have actively opposed the Union's being fastened upon them as their "representative"—in such circumstances, is it not a misinterpretation and misapplication of this Court's decision, in the *Gissel* case, for the Labor Board to require that the Union be recognized and dealt with as the representative of these employees?

STATUTORY PROVISIONS INVOLVED

Provisions of United States statutes pertinent to this case are as follows:

> "Employees shall have the right . . . to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining . . . and shall also have the right to refrain from any or all of such activities . . ."
>
> 29 USC §157

> "It shall be an unfair labor practice for an employer—(5) to refuse to bargain collectively with

the representatives of his employees, subject to the provisions of section 159(a) of this Title".

29 USC §158(a)(5)

"If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof".

29 USC §159(c)(1)

STATEMENT OF THE CASE

In a secret ballot election, conducted by the National Labor Relations Board on April 22 and 23, 1968, at the instance of the Textile Workers Union of America, AFL-CIO, the employees at the Petitioner's[1] plant in Statesboro, Georgia, voted upon the question:

"Do you wish to be represented for purposes of collective bargaining by the Textile Workers Union of America, AFL-CIO?"

By a margin of 198 to 110, the employees' answer was—"No" (73[2]).

Shortly thereafter—but not upon the basis of any matters involved in the present case—the Board's Regional Director set aside the election and directed the holding of a new election (73). Although the Company has not in any manner opposed the holding

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[1]Hereinafter referred to as the Company.

[2]Unless otherwise indicated, page references are to the printed Appendix filed in the Court below.

of a re-run election, no further election has ever been conducted.

Instead, and by another route, the Board arrived at an order directing the Company to bargain and deal with the Union as the representative of the employees at the Statesboro Plant.

Approximately four months after the election the Union filed a charge with the Board, asserting that the Company had violated Section 8(a)(5) of the National Labor Relations Act, in that the Company had failed to bargain with the Union on February 17, 1968, when the Union first requested recognition, and "thereafter".

A complaint upon this charge was, on October 4, 1968, injected, over the Company's opposition (27) into a hearing already underway on other charges. Such other charges were that the Company had violated Sections 8(a)(1) and (3) of the Act, in discharging three employees and in failing to hire an applicant for employment, and in that certain supervisors had been guilty of improper statements and remarks to employees.

At this juncture, 117 of the employees at the Statesboro Plant obtained counsel and intervened in the Labor Board proceedings[1]. At all stages of the case from that time forward these intervening em-

[1]Such intervenor employees are designated in the caption of this Petition as "Mildred G. Bailey, et al".

ployees have actively opposed the efforts of the Union and the Board to require that the employees at this plant be represented by the Union.

The trial of the issue as to whether the Company should be required to recognize and deal with the Union as the representative of the employees centered around the introduction into evidence of the Union's "authorization cards" and was essentially an inquiry into the circumstances and representations involved in the Union's obtaining of such cards.

92 employees testified in derogation of such cards and their signing of them. Most of these witnesses testified that they did not read the card, nor did anybody read it to them. The substance of the testimony of all 92, as each recounted his individual circumstances, was that they signed the cards, or authorized the signing of them, only because of representations: —that the purpose of the cards was "to get an election"—and that the cards could not have any compulsory effect of any sort except to "bring on an election"—and that only by winning such election would the Union be able to require recognition as the representative of the employees at this plant.

The cards of these 92 witnesses were controlling in number, as to whether the Union ever had legally valid authorizations from a majority of the employees. The Trial Examiner and the Board found that the highest card majority the Union reached at

any time was 58, on April 20, 1968, just prior to the election (140[1]).

Thus the elimination of the cards of the 92 witnesses referred to above—or as many as 58 of them —would mean that the Union never at any time had a card majority.

In finding, however, that the Union attained a card majority prior to the election, the Trial Examiner and the Board counted the cards of all of these 92 witnesses who testified in repudiation of the cards and only arrived at a majority by doing so.

To such counting of cards, the Board added one other element, that is, its finding that the Company, regardless of detailed explanation and defense, was guilty of the 8(a)(1) and (3) offenses charged (143).

Thereupon, despite the secret ballot vote of a majority of all the employees against the Union in the Board election, and despite the countering of even a card majority by the testimony of the employees at the Board hearing—still the Board decreed that the employees must have the Union as their representative and that the Company must deal with the Union as the employees' representative (143, 147).

The Court below directed that this order of the Board be enforced, though one of the three members

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[1]The Trial Examiner and the Board found that when the Union first demanded recognition, it did not in truth have valid cards from a majority of the employees (123).

of the Court panel, specially concurring, expressed "misgivings as to the propriety here of the Board's" issuing a bargaining order instead of conducting "a re-run election" (30a).

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

I.

The Setting And Circumstances Of This Case

In 1969, this Court held that "Union authorization cards", under circumstances there delineated, may constitute a basis for requiring an employer to bargain with a Union as representative of his employees. *National Labor Relations Board vs. Gissel Packing Co., Inc.*, 395 US 575, 89 S Ct 1918, 23 L Ed 2d 547.

That decision overturned the holding of several of the Courts of Appeal[1], and there is today, in the field

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[1]The Fifth Circuit, for example, generally rejected authorization cards as a means of achieving representational status.

> " 'Laboratory conditions' are conspicuous by their absence in many cases involving selection of a bargaining representative by the use of authorization cards. The Board itself has said that this is 'a notoriously unreliable method of determining majority status of a union' ".
>
> *National Labor Relations Board vs. Southland Paint Company*, 394 F. 2d 717, 725 (5th Cir., 1968)

The Fourth Circuit said:

> "It would be difficult to imagine a more unreliable method of ascertaining the real wishes of employees than a 'card check', unless it were an employer's request for an open show of hands. The one is no more reliable than the other. No thoughtful person has attributed reliability to

of labor relations, increasing confusion as to what are the proper applications and limitations of this Court's ruling in the *Gissel* case.

The circumstances of the present case urgently point up the need for clarification of the meaning of *Gissel*. This case is a striking example of a situation in which a Court of Appeals, undertaking to reverse its course by reason of *Gissel*, has clearly traveled in an opposite direction, far beyond the intent of this Court.

The salient factors and circumstances here are as follows.

Upon the request of the Union and at a time determined by the Union and the Labor Board, an elec-

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such card checks. This, the Board has fully recognized. So has the AFL-CIO".

National Labor Relations Board vs. S. S. Logan Packing Company, 386 F. 2d 562, 565 (4th Cir., 1967)

The Second Circuit declared that the concept of establishing Union representation through authorization cards "is an abomination", and that:

"The invention and implementation of a scheme by which employees can be befuddled into thinking they are asking for a free election at which each can cast a secret ballot either for or against the Union, whereas they are in fact held to be signing away this very right without knowing they are doing so, seem to us to be a clear violation of Section 7".

Schwarzenbach-Huber Company vs. National Labor Relations Board, 408 F. 2d 236, 249, 250 (2nd Cir., 1969)

The views of the Courts of Appeal in other circuits were to similar effect.

tion was held among the employees at the Company's Statesboro Plant.

The Union and the Board proceeded to that election though well aware of the asserted unfair labor practices which—as they now claim—prevented it from being a fair election.

In the anonymity and privacy of secret balloting, the employees voted against the Union by a wide margin.

The election was set aside and a new election directed. This was done, however, not on the basis of any unfair labor practices then, or now, claimed to have been committed by the Company[1].

The Board has, however, never conducted, nor sought to conduct, the directed re-run election.

Months after the election, the Union filed a charge against the Company, claiming that the Company

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[1]As a matter of election procedure, and not claimed to be in the realm of unfair labor practice at all, the Board's Regional Director ruled, under the Board's then new *Excelsior* doctrine, that the Company should have turned over to the Union a list of the employees' names and home addresses several weeks in advance of the election—in addition to the usual election list of employees, which the Company did furnish, as had been traditionally required, two days ahead of the election. At that time the validity of the Board's new requirement was the subject of varying Court rulings, and neither the Court of Appeals for the Fifth Circuit nor this Court had held that such requirement was valid.

should have recognized and bargained with it, from and after the time it first demanded recognition.

The finding of the Trial Examiner and the Board was, however, that when the Union first and formally demanded recognition and asserted to the Company that it had obtained "authorization cards from the majority" of the employees, such claim was not true or valid (123).

Belatedly and apparently as an afterthought and over the Company's objections, the new charge of failure to bargain was consolidated with the earlier 8(a)(1) and (3) charges, after trial on those earlier charges was already underway.

Upon its becoming publicized that the Union and the Board were seeking to require the Company to bargain with the Union as representative of the employees despite the outcome of the election, 117 of the employees obtained counsel and intervened in the Board proceedings. They took no position or part in the litigation of the 8(a)(1) and (3) charges against the Company. Then and at all subsequent stages of the case, however, they vigorously opposed any decree establishing the Union as the representative of the employees or directing the Company to deal with the Union as the representative of the employees.

The presence of these employees as active litigants is one of the unique aspects of this case — their position being that whatever wrongdoing may have been found against the Company they urgently oppose the

ordering of any so-called "remedy" which fastens the Union upon the employees, as their bargaining "representative", in contravention of their choice and desire.

Upon this issue of whether the Company should be compelled to bargain with the Union as the employees' representative, the trial was chiefly and essentially a probing of the circumstances under which the employees signed "authorization" cards for the Union.

II.

The Labor Board Here Based A Bargaining Order On Union Authorization Cards Which, Under This Court's *Gissel* Decision, Were Invalid For Such Purpose

As has been outlined in the Statement Of The Case, 92 employees gave testimony, under thorough examination and cross-examination, refuting the effect and validity of the cards obtained from them.

Most of the 92 testified that they did not read the authorization card and that it was never read to them[1].

All 92 testified to the effect that they signed the cards, or authorized someone to sign for them, only because of representations to them: — that the purpose of the card was "to get an election" — and that

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[1]There was included in the "small print" on the card a sentence stating that the Union should be the employee's "representative in collective bargaining over wages, hours, and all other conditions of employment".

the cards could not have any compulsory effect of any sort except to "bring on an election" — and that only by winning such election would the Union be able to require recognition as the representative of the employees at this plant.

It is also to be remembered, from the Statement Of The Case, that the Union's card majority never was more than 58, and that in reaching that majority the Trial Examiner and the Board counted the cards of all of these 92 employees who had testified in derogation of the cards.

Each of these 92 witnesses recounted the circumstances surrounding his signing of a card and the representations made to him prior to his signing. The following are typical excerpts from the testimony of these witnesses:

> "I was in the kitchen busy". "They [a Union organizer and a fellow employee] asked me to sign the card so they could have an election". I "had already told them" I was "not for the Union" and "would not vote for the Union". "They insisted that — just to sign it to have the election" (474-477).
>
> "He [a fellow employee] stopped by my machine" and "he said, 'come on and sign the card; you can always vote any way you want to' ". He said "the election would decide" and "they had to have the majority of the cards signed to have the election, but . . . whether or not we got a Union would be decided by the election" (496-497).

"They [two fellow employees] said they wanted to get enough people to sign cards to have an election out there" and "I never did hear them say" that "the Union could come in without an election" (325-326).

Mr. Conner told me "that the only purpose of the card was to get an election" (524).

"The main reason I was at the meeting was . . . to find out more information before I signed a card". Mr. McIver [the chief Union organizer] said "the purpose" was "to get enough signed cards for an election" and "he said if he had enough cards signed that night, he'd burn the road up goin' to Atlanta the next morning" to "see about a petition for an election", and "he said if he lost the election, they would pack the suitcases and go home and leave us alone" (430-431).

"They [a Union organizer and a fellow employee] told me it was for election, and the more they could get signed up, the quicker they'd have election, and the election would decide whether they'd have a union or not" (521).

"They [two fellow employees] just kept talkin', tryin' to get me to sign it. They said that the only way that the Union could get into the plant was if they won the election. So, I took their word for it" (481).

"I told him [a fellow employee] I didn't know anything about it, and I didn't care anything about

it, and I didn't wanna sign it, and if I signed it, I was not gonna vote for it. And, for a long time, I thought I was gonna get outa signin' it, but they just kept right on" (466).

"He [the chief Union organizer] told me the onliest purpose to sign a union card was to get the majority of people to sign it so we could file a petition to the Labor Board, where they could hold election" (374).

"And, he [a Union organizer] explained to me the purpose of signin' the card was to hold an election. He said that was the only purpose of it, and I believe in free elections, so I went ahead and signed the card" (501[1]).

It must be emphasized that under the *Gissel* decision itself, cards signed in such circumstances and upon such representations as these cannot constitute a basis for an order requiring bargaining with a Union as the agent of employees. This Court emphasized in *Gissel* that:

"In resolving the conflict among the circuits in favor of approving the Board's Cumberland rule, we think it sufficient to point out that employees should be bound by the clear language of what they sign unless that language is deliberately and clear-

[1]The testimony of the 92 witnesses can be thus summarized in a single paragraph for each and within a total compass of less than thirty printed pages. In deference, however, to the brevity here expected, the Petitioner will confine its quotation of the employees' testimony to these representative examples.

ly canceled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature.

• • •

"We agree . . . that in hearing testimony concerning a card challenge, trial examiners should not neglect their obligation to ensure employee free choice by a too easy mechanical application of the Cumberland rule . . . 'The foregoing does not of course imply that a finding of misrepresentation is confined to situations where employees are expressly told in haec verba that the 'sole' or 'only' purpose of the cards is to obtain an election. The Board has never suggested such a mechanistic application of the foregoing principles, as some have contended. The Board looks to substance rather than to form. It is not the use or nonuse of certain key or 'magic' words that is controlling, but whether or not the totality of circumstances surrounding the card solicitation is such, as to add up to an assurance to the card signer that his card will be used for no purpose other than to help get an election' ".

National Labor Relations Board vs. Gissel Packing Co., 395 US 575, 606, 607, 89 S Ct 1918, 23 L Ed 2d 547, 574-575

But upon such testimony as is outlined above, can there be any doubt that "the totality of circumstances surrounding the card solicitation" of these employees "adds up to an assurance" to them that their cards

would be used "for no purpose other than to help get an election"?

Upon such testimony, can there be any doubt that the small print wording on the card was "deliberately and clearly canceled" by Union adherents "with words calculated" to cause the signers "to disregard and forget the language" of the cards?

The plain and simple and undeniable truth about the matter is that the employees whose testimony is illustrated above paid heed only to what they were told, and were either wholly unaware of the language on the card, or paid it no attention whatsoever.

> "[T]he clearest written words can be perverted by oral misrepresentations, especially to ordinary working people unversed in the 'witty diversities' of labor law. It is all too easy for the Board or a reviewing court to fall into the error of thinking that language clear to them was equally clear to employees previously unexposed to labor relations matters; to treat authorization cards, which union organizers present for filling out and signing and then immediately take away, as if they were wills or contracts carefully explained by a lawyer to his client is to substitute form for reality".
>
> *National Labor Relations Board vs. S. E. Nichols Company*, 380 F. 2d 438, 442-443 (2nd Cir., 1967)

Yet the Draconian edict of the Board is that the employee is rigidly bound to the legalistic conse-

quences of a phrase buried in the printed wording of the card — no matter that he did not read it and nobody read it to him — no matter that contrary representations were made to him — no matter that he voted to the contrary in the privacy of secret balloting — no matter that under oath and upon examination and cross-examination he gave testimony to the contrary — no matter that he became an active litigant in order to resist the shackle which was then being forged and which has now been locked upon him — no matter that his choice and his desire is the touchstone in the whole matter — no matter — says the Labor Board, with the Court below assenting — the phrase found in the card nevertheless triumphs over all and controls all.

It is submitted that this Court in *Gissel* never so intended.

III.

There Was No True Or Genuine "Conflict" Of Evidence As To The Invalidating Representations Made In The Procurement Of The Union Cards

It is declared however, that the testimony of all the 92 witnesses, in derogation of the cards, is of no import in court because there can be found in the record some "conflict" of evidence on the subject of representations to card signers.

Thus, it becomes of no consequence that scores of witnesses gave particularized, colorful and intrinsically believable details as to the representations made

to each of them, and the individual settings and circumstances thereof, still all such testimony goes for naught, because the Union's organizers denied that there were such representations as these employees had recounted.

The three organizers were, the Trial Examiner observed, men "who had spent many years in organizational activities" (83). For him, this seems to have exalted any broad and self-serving pronouncements on their part above the specific and affirmative and individual accounts of 92 witnesses to the contrary. Yet the Act says that the Board shall make its "findings of fact" only "upon the preponderance of the testimony". 29 USC § 160(c).

The Union representatives offered the thoroughly unnatural and unlikely assertion that they had announced and "stressed" to the employees that they "had not come to secure an election" (81). Should a reviewing Court deem itself prohibited from considering the unreality of this? Is it sensible that "mature" and "experienced" Union organizers would be stressing a negative of this sort to employees, well knowing that if their campaign was successful, it would almost certainly culminate in an election?

Moreover, it is unnecessary to reason that there is not here a genuine "conflict" of evidence. The Union organizers' opportunistic testimony that they had "stressed" to employees that their object was not "to secure an election" is thoroughly, specifically and

wholly refuted by their own writings. For example, their leaflets, introduced into evidence, stated that:

> "The big thing to remember is that the UNION COMMITTEE has told you all along that there would be an election — that the NLRB would conduct it — that it would be by SECRET BALLOT — and that it would be YOUR ELECTION".
>
> • • •
>
> "THE DATE IS SET. EVERYTHING IS IN READINESS".
>
> • • •
>
> "NOW IS YOUR BIG CHANCE. This is the time we've all been waiting for. MAKE IT COUNT!"
>
> (Exhibits on file in Court of Appeals, p. 201)
>
> (Emphasis in original)

Neither the Examiner, nor the Board, nor the Court below, makes any mention whatever of this direct written contradiction by the Union organizers of their own testimony. They point instead to "conflict" between the testimony of the Union organizers, on the one hand, and the 92 employees, on the other hand — and thus declare that the Board's resolution of the matter is unassailable (20a, 31a-32a).

Indeed, the Board does not seem to acknowledge that there is any contest on the subject, declaring instead that "there is no question" about the cards. It disposes of this key issue by a single casual remark in a footnote to its Decision and Order:

> "Accordingly, *as there is no question* that the Union had been validly designated by a majority of

the employees as their representative when the Union renewed its bargaining demand, we find . . . that the policies of the Act will be effectuated by the imposition of a bargaining order . . ." (164) (Emphasis supplied).

It is submitted that review and scrutiny of a decree such as is here at issue ought not to be avoided, nor avoidable, so cavalierly and merely upon a declaration that there is some "conflict" of testimony in some element of the structure of the ruling — and that no matter how tenuous or unimpressive or unreal such "conflict" may be, it nevertheless disarms the judiciary.

This Court long ago emphasized that a major purpose of Congress in amending the National Labor Relations Act, in 1947, was to assure that the Courts would see to it that what the Labor Board declares as proved shall indeed have been reasonably and substantially proved.

> "Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds".
>
> *Universal Camera Corporation vs. National Labor Relations Board*, 340 US 474, 490, 71 S Ct 456, 95 L Ed 456, 468

It is submitted that the Court below failed to heed this fundamental admonition with respect to the state

of the proof in this case on the subject of the representations made to the signers of Union Cards.

IV.

There Are No Shifts In Findings Nor Alternative Grounds Of Ruling Which Would Avoid The Fatal Infirmity Of The Union Cards That The Board Has Relied Upon

The Trial Examiner, as has been noted, did not rule or recommend that the election, in which the employees voted against the Union, should be set aside because of any unfair labor practice on the part of the Company. Nor did the Board's Regional Director do so. Nor has the Board itself so ruled.

The Trial Examiner did not find or rule or recommend that any unfair labor practice on the part of the Company had rendered a free and fair re-run election either impossible or improbable. He found only that the Union achieved a card majority prior to the election and that the Company, because of its unfair labor practices, could not have entertained "a good faith doubt" of this (142[1]). Upon these two ele-

[1]This is, of course, an artificial rationalization, amounting to nothing other than an irrebuttable and legalistic presumption—for, as has already been noted; the Examiner himself finds that the Union's original assertion of majority was not only doubtful but untrue, and his finding that the Union afterwards attained a card majority is arrived at only upon intricate analysis of complicated testimony and evidence, which was certainly not available to the Company. Yet the Examiner accords to the Company a power of divination greatly superior to his own, for, says he, the Company could have had no real doubt on the matter.

ments, the Examiner held that the Company had violated Section 8(a)(5) of the Act and must therefore be ordered to bargain with the Union as the employees' representative.

Ten days after the Trial Examiner issued his Decision, this Court rendered its decision in *Gissel*. *Gissel* stated that "under the Board's current practice", to which the Board's Examiner apparently was not privy, "an employer's good faith doubt is largely irrelevant" (395 US at 594). Instead, said this Court, "the key to the issuance of a bargaining order is the commission of serious unfair labor practices" (395 US at 594), "which have made the holding of a fair election unlikely or which have in fact undermined a union's majority and caused an election to be set aside" (395 US at 610[1]).

Adjusting to this explication in *Gissel*, the Board shifted from the course taken by its Examiner at the trial and in his Decision, and readily phrased a new "finding", albeit in footnote, that the "holding of a fair and coercion free rerun election" was "improbable if not impossible" (164).

Then, superimposing upon this the thoroughly unjustified assertion that "there is no question that the Union had been validly designated by a majority of the employees as their representative" through the signing of the cards, the Board brings forth an ex-

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[1]It will again be remembered, however, that here the election was not set aside because of any unfair labor practices.

pediently retailored bargaining order — but one still based and founded upon the cards.

As an alternative to the infirmities of such process, the Court below declares that "the extensiveness of the unfair labor practices here" supports a bargaining order "even if the Union never possessed a valid card majority" (14a). This pronouncement, however, seems clearly beyond the Court's proper reach.

The charges and complaints in the case asserted no such claim. The trial of the case proceeded upon no such theory. The Trial Examiner made no such ruling or recommendation. Nor does the Board appear to have made any such ruling — for, as has been noted, the Board says that "accordingly, as there is no question that the Union had been validly designated by a majority of the employees as their representative . . . the policies of the Act will be effectuated by the imposition of a bargaining order" (164).

Indeed, the Court below expressly recognized that the Board had placed its reliance on the Union's having attained a valid card majority. The Court says that "relying on what it found to be a card majority for the Union on March 18, the Board ordered Stevens to recognize and bargain with the Union" (5a[1]).

---

[1]In a Complaint issued against the Company as recently as March 2, 1970, the Board, reiterating its contention that the Company is under a duty to bargain with the Union, still bases such contention solely upon the proposition that the employees at this plant have "designated and selected the Union as their representative" (Board Case No. 10-CA-8108).

The Court says that it is "under *Gissel*" that the Company by reason of its "pervasive" unfair labor practices may be ordered to bargain though "the Union never possessed a valid card majority" (12). As authority for such pronouncement the Court points to no decision of this Court save *Gissel* (14a).

Yet *Gissel* made no such ruling. In all the four cases consolidated under *Gissel*, card majorities were claimed and relied upon. And in *Gissel*, this Court expressly said:

> "The only effect of our holding here is to approve the Board's use of the bargaining order in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes. The Board's authority to issue such an order on a lesser showing of employer misconduct is appropriate, we should re-emphasize, where there is also a showing that at one point the union had a majority; in such a case, of course, effectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehavior". (395 US at 614)

Thus, the Court below has misread *Gissel*. And whether it looks to the charges, the complaints, the trial of the case, the Trial Examiner's Decision, the Board's Decision and Order, or to *Gissel* — it can find no support for its pronouncement that the issue of the validity of the card majority may be by-passed in this case.

As to the "pervasive" and "egregious" nature of the unfair labor practices asserted against the Company, the allegedly coercive and disputed remarks were claimed to have been made by supervisors to some eight separate employees. The employees discharged were three, over a period of two months among a total of more than three hundred employees, and the Company presented full and detailed evidence that one of these was discharged for deliberately and repeatedly ignoring his supervisor's instructions — another for poor performance, including sleeping on the job — and the third for threatening a fellow employee.

On these matters there was significant conflict of testimony. Yet it should be noted, even in this Court, that on all of such conflict, uniformly and without exception the Board and its Examiner found that truth resided always in the witnesses for the Union and the Board and never in the witnesses for the Company[1].

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[1]So it was in the original and basic case involving contest between the Union and the Board, on the one hand, and this Company, on the other, which is invariably cited by the Union and the Board as an example of "background" unfavorable to this Company. There, some 443 witnesses testified on a multitude of disputed and material factual issues. The Board conducted hearings over a period of months at various locations. Most of the witnesses testified in behalf of the Company. They included not only supervisors and representatives of management, but rank and file employees and persons unconnected with the Company as well.

Yet, not once upon any conflict as to disputed facts, did the

V.

Having Demonstrated, By Secret Ballot And Sworn Testimony And Intervention As Active Litigants, That They Do Not Want The Union As Their Representative, The Employees' Desire Should Be Heeded—And Interpretation Of This Court's Decision In *Gissel* As Requiring An Opposite Result Should Not Be Permitted

The Court below apparently accepts it as clearly established that the employees do not desire the Union as their representative. The Court says that "we realize that . . . the Union has not been able to retain its majority status" (23a). The Court says, however, that this is "a result of the employer unfair labor practices" (23a). The Board likewise declares "that the unfair labor practices . . . in fact did dissipate the Union's majority" (164).

These are, however, pronouncements and presumptions on the part of the Board and the Court. There was no evidence that any employees actually turned away from the Union because of any unfair labor prac-

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Board ever credit a witness favorable to the Company as against a Union or Board witness—and not once did the Board ever discredit a Union or Board witness as against a Company witness.

On all this wide and intricate panorama of factual litigation, the Board's view was that truth was always the exclusive monopoly of witnesses on one side, and was never to be found elsewhere.

tices on the part of the Company. Indeed, there was no evidence that employees of a number sufficient to affect the outcome of the matter even knew of the discharge of the three employees referred to above or the alleged coercive statements by supervisors to the eight separate employees. It is also to be remembered that it was after the occurrences of these alleged unfair labor practices and immediately preceding the election that the "sign-up" of Union cards reached its highest point (140).

On the other hand, at the trial, the Company sought to take on the burden of showing, and was denied the opportunity of showing, that the alleged occurrence of unfair labor practices actually and in truth had no bearing on the Union's attaining or maintaining or losing majority status (Tr. 2807). The Trial Examiner refused to permit the Company to question employee witnesses on this central issue.

The Board, with the lower Court's acquiescence, assumes the answer to this key question and makes it a matter of irrebuttable presumption by barring all proof to the contrary.

Similar presumption and refusal to consider contrary proof is continuously involved in the Board's and the Court's references to the Union's having had "majority status" and in the Court's references to the employees' "subsequent recantation" (22a, 23a). It is only by disregarding the testimony of the 92 witnesses that the Board is able to declare that the Union ever had

any true "majority status". It is only by ignoring what they said under oath that the Court is able to refer either to their election vote or their testimony as a "recantation".

What they testified in open hearing, and under examination and cross-examination, was that they never did want the Union as their representative unless it won a majority vote in a secret ballot election—and that they signed cards only because it was represented to them that recognition of the Union as bargaining agent could be required only upon the Union's winning a majority vote in such an election. This being their position at the time of signing the cards, the Union never in truth had in such cards a "majority status", and neither the election result nor the testimony of the 92 witnesses was a "recantation" of anything.

Still another basic misconception permeates the decision of the Court below. The Court refers to the 117 individual intervenors as "employees who now intervene on behalf of the Company" (22a).

This fundamentally overlooks the rights which are here at stake. Indeed, it loses sight of the central thrust of the law which is here being administered.

Employees are entitled to be represented by a Union if they so choose—and are equally entitled not to be represented by a Union if they do not so choose. 29 USC §157. It is a violation of the National Labor Relations Act to impose upon them a Union representation which they do not want. It is a violation of that Act for

bargaining negotiations to be conducted between their employer and a Union which they do not in truth desire as their representative.

At the trial of this case and in their arguments to the Board and the Court, these intervenor employees urged that it had "apparently" been "forgotten that the matter here presented for resolution is that which will best protect *employee* rights, not the determination of who will triumph in a litigated contest between the Company and the Union. The free choice of those workers of the Statesboro Plant who rejected organization must be implemented whether or not that implementation serves the best interests of either the employer or the Union" (Brief of Mildred G. Bailey, et al in Court of Appeals, p. 27) (Emphasis in original).

> "The rights involved are those of the employees . . . The right of employees to a choice and a choice through the secret ballot should not be lightly disregarded . . . Anything less disparages the rights accorded employees under §7 of the Act and may visit the sins of the employer on the employees. The struggle is between the employer and the union but the right to select is that of the employees".
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> *National Labor Relations Board vs. Lake Butler Apparel Company,* 392 F. 2d 76, 82 (5th Cir., 1968)

Yet, as has been noted, the lower Court thinks of the efforts of the intervening employees in this case as being "on behalf of the Company". More accurate-

ly, the basic strength of the Company's opposition here consists of the simple principle that the choice of the employees is all-controlling — and that since they have demonstrated that they do not desire to be represented by the Union, the Company should not be required to deal with this Union as their representative.

These employees have so demonstrated, not once but twice — first by secret ballot and, secondly, by sworn testimony in open hearing. And on the second occasion they explained, firmly, positively and emphatically, that their signing of cards in an apparently opposite direction was conditioned upon representations that the cards would bring on an election, and that the election — not the cards — would determine whether the Union would be the representative of the employees at this plant.

After all, it is a remarkable non sequitur to say that the way to punish an employer for wrongdoing, or to "remedy" his wrongdoing, is to impose upon his employees a Union representation which they do not want — and which they have proved they do not want both by secret ballot and by sworn testimony. Through such quixotic process, the Labor Board transforms itself from guardian of employee choice to dictator of employee choice.

It is submitted that this Court should make clear that it has not in *Gissel,* nor in any other decision, so required or so authorized.

CONCLUSION

Upon all of the foregoing, the Petitioner earnestly prays the Court for a Writ of Certiorari, directed to the United States Court of Appeals for the Fifth Circuit, to the end that this Court may review the decision which has been rendered by that Court in the present case.

Respectfully submitted,

WHITEFORD S. BLAKENEY
Attorney for the Petitioner